

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON BREWERS INSTITUTE, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANTS

WASHINGTON BREWERS INSTITUTE, HENRY T. IVERS, H. J. DURAND, OLYMPIA BREWING COMPANY, PETER G. SCHMIDT, ADOLPH D. SCHMIDT, COLUMBIA BREWERIES, INC., EAST IDAHO BREWING CO., INC., JOSEPH F. LANSER, HARRY P. LAWTON, E. LOUIS POWELL, CALIFORNIA STATE BREWERS INSTITUTE, JAMES G. HAMILTON, SEATTLE BREWING & MALTING CO., THE SPOKANE BREWERY, INC., WILLIAM H. MACKIE, RENE BESSE, EMIL G. SICK, GEORGE W. ALLEN, PIONEER BREWING CO., RUSSELL G. HALL, BOHEMIAN BREWERIES, INC., EDWIN F. THEIS, IDAHO BREWERS INSTITUTE, STEVE T. COLLINS, OVERLAND BEVERAGE CO., BECKER PRODUCTS CO., GUS L. BECKER, C. C. WILCOX, THE BREWERS INSTITUTE OF OREGON, GEORGE F. PAULSEN, INTERSTATE BREWING CO., G. V. UHR, PACIFIC BREWING & MALTING CO. AND
JAMES E. KNAPP.

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IN THE
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WASHINGTON BREWERS INSTITUTE, <i>et al.</i> , <i>Appellants,</i>	}	No. 10,303
vs.		
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UPON APPEAL FROM THE DISTRICT COURT OF THE
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BRIEF OF APPELLANTS

Washington Brewers Institute, Henry T. Ivers, H. J. Durand, Olympia Brewing Company, Peter G. Schmidt, Adolph D. Schmidt, Columbia Breweries, Inc., East Idaho Brewing Co., Inc., Joseph F. Lanser, Harry P. Lawton, E. Louis Powell, California State Brewers Institute, James G. Hamilton, Seattle Brewing & Malting Co., The Spokane Brewery, Inc., William H. Mackie, Rene Besse, Emil G. Sick, George W. Allen, Pioneer Brewing Co., Russell G. Hall, Bohemian Breweries, Inc., Edwin F. Theis, Idaho Brewers Institute, Steve T. Collins, Overland Beverage Co., Becker Products Co., Gus L. Becker, C. C. Wilcox, The Brewers Institute of Oregon, George F. Paulsen, Interstate Brewing Co., G. V. Uhr, Pacific Brewing & Malting Co. and James E. Knapp.

1. STATEMENT OF JURISDICTIONAL FACTS

On May 5, 1941, a grand jury within and for the Northern Division of the Western District of Washington returned an indictment charging the appellants and others, in two counts, with violations of Sections

1 and 3 of the Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (26 Stat. 209) commonly known as the Sherman Act (Tr. 6).

Appellants were duly and regularly arraigned and granted the opportunity of filing motions and demurrers directed at the indictments. Demurrers were filed by all appellants (Tr. 38) and argued. The demurrers were overruled by the District Court (Tr. 52).

Appellants entered pleas of *nolo contendere* and judgment and sentence was imposed by the court (Tr. 58 to 132 inc.).

Notices of appeal were seasonably filed by all appellants and proper orders entered pursuant to the Rules of the Supreme Court of the United States directing the payment of the fines imposed, to the Clerk of the District Court to be held in escrow pending appeal.

An order was entered pursuant to Rule VIII of the Rules of the Supreme Court of the United States for appeals after Plea of guilty or Verdict designating the time within which to file Assignments of Error and the preparation and forwarding of the Record. Assignments of Error were timely filed (Tr. 138).

In order to avoid encumbering the record by submitting the numerous identical demurrers filed by the several defendants, one such demurrer only is included in the record (Tr. 38) with appropriate stipulation (Tr. 133 and 135).

II. STATEMENT OF THE CASE

(a) The Indictment

The appellants are engaged, directly or indirectly, in the manufacture and sale of beer, an intoxicating alcoholic beverage.¹ The indictment charges, in Count I, that the appellants violated Section 1 of the Sherman Act² by combining and conspiring to raise, fix, stabilize and maintain uniform, artificial and non-competitive prices for beer sold and distributed in the States of California, Oregon, Idaho and Washington. Count II of the indictment charges the violation of Section 3 of the Sherman Act³ with respect to the Territory of Alaska. The indictment sets forth the means by which it is alleged the conspiracy was effectuated, as we shall hereinafter notice in detail.

To this indictment appellants demurred on the following grounds:

1. That the indictment as to either or both counts does not state facts sufficient to constitute a crime against the United States.

2. That it does not appear from the indictment that the matters therein charged to constitute a violation of the Sherman Anti-Trust Act are subject to or within the jurisdiction of the court.

3. That the Sherman Act is not applicable to the

¹Washington: Rem. Rev. Stat. 7306-3 *et seq.*

Oregon: Ore. Comp. Laws Ann. Sec. 24-103 *et seq.*

Idaho: Sec. 1 and 2, Ch. 132, L. 1935.

California: Sec. 2 *et seq.*, Chap. 330, L. 1935, as amended by Ch. 758, L. 1937.

²26 Stat. 209, 15 U.S.C.A. 1—See Appendix I for text.

³15 U.S.C.A. 3—See Appendix I for text.

alleged combination, conspiracy and acts pursuant thereto under the provisions of the Twenty-First Amendment⁴ to the Federal Constitution.

4. That the indictment is vague, uncertain and indefinite, because it cannot be ascertained therefrom which acts were done pursuant to state law, or in violation thereof, and which acts were not in compliance with or done pursuant to state law or laws.

ASSIGNMENT OF ERROR

The appellants assign as error the failure and refusal of the District Court to sustain their several demurrers. The assignment is

“That the court erred in overruling the defendants’ demurrers to the indictment duly and regularly filed herein and overruled by the court by its order entered herein on the 19th day of January, 1942, over the exceptions of the defendants at the time.” (Tr. 138-9)

⁴Article XXI Amendments to Constitution of the United States—See Appendix I for text.

ARGUMENT

Our argument will be directed to two main theses, presented in the alternative. These alternative propositions may be briefly stated thus:

I.

Since the adoption of the Twenty-First Amendment to the Federal Constitution, the Federal Government has no jurisdiction over commerce, among the several states or with the territories, in intoxicating liquor, or

II.

The Twenty-First Amendment is a continuing offer by the people of the United States, to each of the states and territories to enter and occupy the field of regulating commerce in intoxicating liquor, and when any state or territory has entered and occupied or pre-empted such field by appropriate legislative action then such occupation or pre-emption is exclusive and the Federal Government has no authority to legislate on the same subject or in the same field.

We will argue these propositions in the foregoing order with complete confidence that as a matter of law the first is sound and irrefutable but giving recognition also to the soundness and utility of the second.

We are all well aware of the epic struggles of the American electorate, and of the legislative, executive and judicial branches of the Federal and State Governments in attempting to solve the social and economic problems, both real and imaginary, inherent in the traffic in intoxicating liquor. We are here engaged in another effort to cope with the problems, an

effort which will have a lasting and important effect on the present and future.

We have passed successively, in our national history, through periods of little or no regulation, incipient and growing movements for reform and prohibition, open saloons and political abuses, county local option, state prohibition, national prohibition, lawlessness and gangsterism until we arrived at repeal of the Eighteenth Amendment and a partially new era giving birth to new and heretofore untried (insofar as the United States is concerned) methods. *Out of these new methods comes this indictment.*

Brewers located and doing business in four Pacific Coast States are indicted for violation of the Sherman Anti-Trust Act, a Federal Statute passed to prevent restraint of freedom of action in interstate trade and commerce and to prevent undue suppression or restriction of the play of competition in the conduct thereof.⁵

The Sherman Act is in truth the statutory enactment of the "laissez faire" doctrine of economics. It presumes the truism "free competition is the life of trade." Economists, moralists and lawmakers have disagreed with this doctrine, but since 1890 it has remained the policy of the United States.

However, the four states, in which the involved brewers are located and are doing business, have seen fit to adopt a different and an opposed theory of

⁵*U. S. v. Union Pac. R. Co.*, 226 U.S. 61.

American Column Etc. Co. v. U. S., 257 U.S. 377.

economics in the regulation and control of the traffic in intoxicating liquor.

During most of the history of this country some restrictions have been placed on this business. It was considered as a contributing factor in certain social evils, if not in fact inherently evil of itself. Commonly, only licensed persons were permitted to deal legally in it and conditions were laid down governing the acquisition and retention of such licenses.

In three of the states above mentioned, to-wit, Washington, Oregon and Idaho, a completely restrictive scheme, commonly known as "The State Monopoly" System, was adopted and has remained in effect.⁶ In the fourth, California,⁷ the system was not adopted but many of the restrictive provisions were enacted. Fundamentally, this system prevents free competition, outlaws many widely used business practices designed to promote sales, and exercises a complete and thorough control not only over the social conditions surrounding this traffic but the economic as well.

This system is not new. It had never been attempted in this form in the United States prior to prohibition (although South Carolina did briefly try the

⁶Washington—Chap. 62, Laws of 1933 (SS); Rem. Rev. Statutes 7306-1 *et seq.*

Oregon—Chap. 17, Laws of 1933 (2d SS); Ore. Comp. Laws Ann. 24-101 *et seq.*

Idaho—Chap. 132, Laws of 1935; Chap. 48 Laws of 1937; Chap. 242, Laws of 1939.

⁷California—Chap. 330 Laws of 1935; Deering's Act. No. 3796.

State Dispensary System) but it had been successfully enacted and enforced in other countries.⁸

These laws are diametrically opposed in theory and practice to the Sherman Anti-Trust Act. We will demonstrate that fact later by reference to specific provisions. The appellants have complied with these state laws in theory and practice, feeling that they represent a sound middle ground between open, unchecked traffic and prohibition, and feeling also that these laws gave the greatest possible guarantee (assuming their enforcement) against the rise of evils which were conceived as the cause of prohibition.

With this brief resume we will proceed to present our alternative grounds either or both of which we contend require that our demurrer be sustained.

I.

Since the Adoption of the Twenty-First Amendment to the Federal Constitution the Federal Government has no jurisdiction over commerce among the several states or with the territories, in intoxicating liquor.

In support of this contention we urge

- (a) The conflict between state and nation over the control of this subject matter and the trend of legislation and decision resulting therefrom.
- (b) The intention and belief of those who composed and presented the Twenty-First Amendment.
- (c) The actions of the states immediately following the adoption of the Twenty-First Amendment.
- (d) The decisions of the Supreme Court of the United States.

⁸Such as Sweden and Canada.

- (e) The application of fundamental principles and concepts of constitutional law.

(a) *The conflict between state and nation.*

Perhaps before, but at least beginning with *The License Cases*,⁹ there appeared an open conflict between state and nation over the control of the traffic in intoxicating liquor. Individual states adopted restrictive legislation and persons seeking to avoid these restrictions sought and sometimes secured the aid of the Federal Government in avoiding, circumventing or nullifying such restrictions. In *The License Cases*, *supra*, a divided court upheld the police power of the states, in its restrictions on interstate commerce to the extent that license laws of the states were recognized and shipments in interstate commerce limited to license holders. But when more restrictive state legislation was adopted the court refused to permit further interference with interstate commerce.¹⁰

Congress recognized the situation thus created and for perhaps the only time in the history of the struggle of nation and state for pre-eminence in power Congress legislated in aid of state enactments.

The first act was popularly known as the "Wilson Original Packages Act,"¹¹ by which intoxicating liquor in the original package was ostensibly removed from the protection of the Commerce clause and it

⁹46 U. S. 504.

¹⁰*Bowman v. Railway Co.*, 125 U.S. 465.

Leisy v. Harding, 135 U.S. 100.

¹¹26 Stat. 313; 27 U.S.C.A. 121—See Appendix I for text.

declared that the law of the state would attach upon arrival as though it had been originally manufactured in the state. By judicial interpretation this apparent intention was nullified.¹²

Congress then, surprisingly enough, went as far as it could in attempting to redelgate to the states, the authority delegated by the commerce clause. It passed the Webb-Kenyon Act.¹³ This act prohibited the shipment or transportation in interstate commerce of intoxicating liquor which was intended to be used or possessed in the state of destination in violation of the law of the state. This act might well be said to be the pattern of the Twenty-First Amendment.

Its constitutionality was seriously doubted by many eminent constitutional lawyers, who though having no interest in the commerce in intoxicating liquor, joined in an attack on its constitutionality. They contended that the act was an attempt by Congress to divest itself of a power specifically delegated to it by the Constitution. It was inconceivable that Congress could be permitted to do this, because if it could do it with respect to one power, it could with respect to all. They further contended that *such redelegation could be accomplished only by an amendment to the Constitution* in the manner prescribed.

¹²*Re Rahrer*, 140 U.S. 545; *Rhodes v. Iowa*, 170 U.S. 412.

See also *Adams Express Co. v. Kentucky*, 238 U.S. 190.

¹³37 Stat. 699; 877; 49 Stat. 877; 27 U.S.C.A. 122; See Appendix I for text.

However, the Supreme Court upheld the constitutionality of this act,¹⁴ though with some obvious misgivings. Constitutional lawyers still considered the act doubtful and the overruling of the decision a probability.¹⁵

In the meantime, Congress went one step further and adopted the so-called "Reed Amendment".¹⁶

The wave of prohibition was growing. County and state with unexpected rapidity adopted prohibitory acts. Then followed the Eighteenth¹⁷ Amendment and the "noble experiment."

In passing, two unique characteristics of the Eighteenth Amendment should be noted.

First: It withdrew intoxicating liquor and the regulation thereof from the provisions of the Commerce clause. It prohibited *any commerce* in this commodity.

Second: It removed the distinction between *inter-state* and *intrastate commerce* insofar as intoxicating liquor was concerned. It gave the Federal Government jurisdiction over all acts of commerce of every character within the territorial limits of the United States and its possessions. The states *concurrently* retained the powers they previously possessed, and were

¹⁴*James Clark Dist. Co. v. Western Md. R. Co.*, 242 U.S. 311.

¹⁵Cong. Rec. Vol. 76, p. 4172—Remarks of Senator Borah.

Dunn v. U. S., 98 F.(2d) 119, p. 124.

¹⁶39 Stat. 1069.

¹⁷Article XVIII, Amendments to the Constitution of the United States—See Appendix I for text.

relieved from the restrictions arising under commerce clause coextensive, of course, with their separate territorial jurisdictions. This was the first and only time in American constitutional history that either of these things had ever happened. They are without precedent.

For further reference we wish to emphasize the fact that after the adoption of the Eighteenth Amendment there was no *interstate commerce* in intoxicating liquor.

During its existence there could have been no conspiracy, contract or combination in restraint of trade or commerce in intoxicating liquor which would violate the Sherman Act. True, they might violate the Eighteenth Amendment and the enforcement acts pursuant thereto, but not the Sherman Act. There could be no trade or commerce within the meaning of the Sherman Act.

We wish here and later to emphasize that this was the constitutional character of intoxicating liquor when the Twenty-First Amendment was adopted.

With the admitted failure of the Eighteenth Amendment to accomplish its purpose, and the greater evils it created, came the adoption of the Twenty-First Amendment. It did not simply repeal the Eighteenth Amendment and thus restore intoxicating liquor to its previous character. It did repeal the Eighteenth Amendment but simultaneously it redefined the constitutional status of intoxicating liquor and designated the sovereignty which should determine the legality or illegality of commerce in this commodity. It said that the state laws should determine what acts,

in commerce among the states, were illegal and it *prohibited interference with such state declaration.*

Against whom was this prohibition directed? Certainly not against citizens of the states. A declaration in the Federal Constitution that "violation of state laws is hereby prohibited" would be a nullity. The states have the sovereign and exclusive right to punish violations of their own laws, and the invasion of the Federal Government in that field would be unwarranted and ineffectual.

Who was it, who had possessed the authority to permit or direct the violation of state laws? It was the Federal Government exercising its authority under the Commerce clause. And as the past history shows, this was considered a real menace. The prohibition is obviously against the Federal Government and against all persons seeking the protection of the Federal Government under the Commerce clause.

Thus in repealing the Eighteenth Amendment, which had divested intoxicating liquor of its interstate commerce character, the Twenty-First Amendment did not reinvest it with its former interstate commerce character. This is borne out most strongly by the further points we will make.

(b) Intention of composers and proposers of the Twenty-First Amendment.

The text of the Twenty-First Amendment was drafted by a Sub Committee of the Judiciary Committee of the United States Senate, the Chairman having been Senator Blaine of Wisconsin. As originally drafted and presented to the United States Senate, it contained four sections. The first repealed

the Eighteenth Amendment, the second was the present second section prohibiting importation in violation of state laws, the third section gave the Federal Government concurrent jurisdiction,¹⁸ and the fourth provided for its enactment.

The Senate debate turned almost entirely upon a motion to strike the *third* section providing for concurrent jurisdiction in the Federal Government. After considerable argument it was defeated—as was an amendment to the same effect presented by Senator Glass of Virginia.¹⁹

Arguing against concurrent federal power, Senator Wagner of New York said in part:²⁰

“Mr. President, in addition to these general objections to the resolution, I desire to set forth seven specific objections.

“*First*: The inevitable consequences of section 3 will be that the liquor question will continue to bedevil national politics. It is unquestionably true that part of the force back of the movement for repeal was the desire to bring to an end the intrusion of that problem into the national sphere, which had served in many ways to confuse public consideration of truly national problems. Section 3 of the pending resolution perpetuates that condition.

¹⁸This proposed section read:

“Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquor to be drunk on the premises where sold.” 76 Cong. Rec. 1661.

¹⁹76 Cong. Rec. 4211-2 and 4229-30.

²⁰76 Cong. Rec. 4145.

“*Second*: The power of Congress ‘to regulate or prohibit’ which is conferred by Section 3, is described as ‘concurrent power’. In other words, we shall have two authorities, federal and state, simultaneously possessed of jurisdiction over the same area of regulation. The zone which each is to occupy is undefined. It is the kind of provision which unavoidably leads to confusion, conflict, and litigation. Ultimately, of course, the history of ‘concurrent power’ under this new amendment would not differ from that of ‘concurrent’ power under the Eighteenth Amendment. Instead of ‘concurrent’ the power of Congress will be dominant and absolute over the states. No other result is possible. *Two sovereignties in conflict cannot both prevail*. In this instance, as in every other instance, it will be the national and not the state authority which will be supreme; *and that is the ironical result of an amendment designed to restore to the states control of their liquor problem.*” (Emphasis added)

Concerning this same “concurrent power” section Senator Blaine said:²¹

“ * * * The purpose of Section 2 is to restore to the states by constitutional amendment *absolute control* in effect over interstate commerce affecting intoxicating liquors which enter the confines of the states. * * * My view therefore is that Section 3 is *inconsistent* with Section 2, and the two sections are *incompatible* and that Section 3 ought to be taken out of the resolution.” (Emphasis added)

And Section 3 was stricken. “Concurrent power”

²¹76 Cong. Rec. 4143.

was twice defeated. The Twenty-First Amendment went to the nation without any provision for federal authority concurrent or otherwise and was adopted.

When Senator Blaine, as Chairman of the Special Senate Committee, made his report to the Senate he described the text of this amendment in these words:²²

“ * * * *When our Government was organized and adopted, the states surrendered control over and regulation of interstate commerce. This proposal is restoring to the states, in effect, the right to regulate commerce respecting a single commodity — namely, intoxicating liquor. In other words, the state * * * by reason of this provision, * * * acquires powers that it has not at this time. * * **” (Emphasis added)

The arguments and contentions of Senators Blaine and Wagner, and their colleagues, prevailed and the Twenty-First Amendment went to the people as they advocated. The people of the nation believed that the amendment would have the effect these proposers said it would have.

(c) *The actions of the States.*

State legislatures were convened into session regular or special as soon as the amendment became effective and in almost every instance enacted completely comprehensive legislation on this subject. Sixteen

²²76 Cong. Rec. 4141. See dissenting opinion, 98 F. (2d) 119.

states adopted "The State Monopoly System" of which we spoke above.²³

Regardless of the form which these various laws took, in general, all of them almost without exception were more restrictive than any similar legislation prior to prohibition. Each legislative body reflected the announced intention of the people in holding tight rein on this traffic to prevent, if possible, the well advertised evils which presumably had caused prohibition.

Quite generally free and open competition was prohibited. The business of buying and selling intoxicating liquor was surrounded with restrictions preventing the use of promotional and competitive practices so common to American business. Separation of the manufacturer and wholesaler from the retailer became a common characteristic. All possible means of ownership or control, direct or indirect, of the retail outlet was forbidden to the manufacturer and wholesaler. Credit was forbidden. Price controls were provided. Advertising was restricted. Sales aids and promotional devices proscribed or severely circumscribed. Every possible restraint appeared. The laws were designed to and did wholly occupy the field both from the standpoint of the subject matter and territorial jurisdiction. Every drop of intoxicating liquor, no matter where it was manufactured or how it came

²³Idaho, Iowa, Maine, Michigan, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming; Alabama now makes the seventeenth.

to be in the state, came under the control of the law. Some even reached out beyond state borders and required a blanket coverage by state law by agreement before a manufacturer could secure permission to ship his products into the state.²⁴

Thus did the states manifest their understanding of the meaning and effect of the Twenty-First Amendment. And strictly in keeping with what Congress had said the language meant.

(d) The decisions of the courts.

Eventually and inevitably the clash of sovereignties (the old concept of federal authority under the Commerce clause and state laws adopted subsequent to the Twenty-First Amendment) brought questions to the Federal Courts. The first to reach the Supreme Court of the United States originated in California where the legislature had determined to require the securing of a license and the payment of a fee of \$500.00 for the privilege of importing intoxicating liquor—beer—into that state. Here was a state committing the cardinal sin against commerce among the states—the practice which more than any other had caused the placing of the Commerce clause in the Constitution—laying an impost upon that commerce by a state.

Certainly if the commerce clause could be violated—this was *the* violation. The lower court declared the California law unconstitutional. But the Supreme Court had no difficulty in reversing that de-

²⁴See reference to restrictive measures of this type in laws and regulations of states involved in Appendix II and III.

cision and finding the Twenty-First Amendment to mean what Congress, the people and the states had thought it meant. In *State Board of Equalization v. Young's Market*,²⁵ Mr. Justice Brandeis, speaking for a unanimous court, said:

"Prior to the adoption of the Twenty-First Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege. The imposition would have been void * * * *because the fee would be a direct burden on interstate commerce*; and the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide. The exaction of a fee for the privilege of importation would not, before the Twenty-First Amendment, have been permissible even if the state had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler's place of business. * * *

"The amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' *abrogated the right to import free so far as concerns intoxicating liquors*. * * *

"The plaintiffs argue that, despite the amendment, a state may not regulate importations except for the purpose of protecting the public health, safety and morals; and that the importer's license fee was not imposed to that end. Surely the state may adopt a lesser degree of regulation than total prohibition. Can it be doubted that *the state might establish a state*

²⁵299 U.S. 59.

*monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee? * * **

“The plaintiffs insist that to sustain the exaction of the importer’s license-fee would involve a declaration that the amendment has, in respect to liquor, freed the states from all restrictions upon the police power to be found in *other* provisions of the Constitution. The question for decision requires no such generalization.” (Emphasis added)

By the language of this decision the court unmistakably decided that intoxicating liquor was no longer an article of commerce governed by the commerce clause. It recognized that no article of interstate commerce within the constitutional meaning of that term may be subjected by the state to an impost as a condition to its importation. Insofar as intoxicating liquor is concerned, the Twenty-First Amendment “abrogated the right to import free.”

The court quite significantly held that the state’s power to regulate intoxicating liquor or importations thereof was not limited to protecting the public health, safety or morals. It illustrated the point by specifically indicating that the state could establish either a public or a private monopoly of the business free from any interference by the Federal Government.

In *Mahoney v. Joseph Trinner Corporation*,²⁶ the plaintiff contended that the state statute, which pro-

²⁶304 U.S. 401.

vided that certain imported intoxicating liquors could be brought into the state only if the container bore a label registered in the Patent Office of the United States, violated the equal protection clause of the Constitution. In determining that the statute did not violate the equal protection clause the court said:

"The sole contention of the Joseph Trinner Corporation is that the statute violated the equal protection clause. The state officials insist * * * that since the adoption of the Twenty-First Amendment the equal protection clause is not applicable to imported intoxicating liquor. * * * we are of the opinion that the latter contention is sound, * * * .

"*First*: The statute clearly discriminates in favor of liquor processed within the state as against liquor completely processed elsewhere. * * * That, under the amendment, discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic was settled by *State Board of Equalization v. Young's Market*, 299 U. S. 59, 62, 63."

Thus the second of the cardinal sins against commerce among the states, which gave rise to the commerce clause was wiped out. The states were no longer restricted from discriminating between commerce within and commerce from without the state.

In *Indianapolis Brewing Co., Inc. v. Liquor Control Commission*,²⁷ and *Joseph S. Finch & Co. v. McKittrick*,²⁸ the court considered certain "anti-discrimina-

²⁷305 U.S. 391.

²⁸305 U.S. 395.

tory" legislation adopted by the states of Michigan and Missouri. These acts prohibiting the importation into the respective states of intoxicating liquor manufactured in other states which were declared to have enacted legislation discriminating against the products of Michigan and Missouri, were attacked on the ground that they violated the commerce, due process, and equal protection clauses of the Constitution.

In declaring the laws to be valid, the court said, in the *Indianapolis Brewing* case:

"Since the Twenty-First Amendment * * * has held in the *Young* case, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause; and as held by that case and *Mahoney v. Joseph Trinner Corp.*, 304 U.S. 401, 58 Sup. Ct. 952, 82 L. ed. 1424, discrimination between domestic and imported intoxicating liquor or between imported intoxicating liquor, is not prohibited by the equal protection clause. The further claim that the law violates the due process clause is also unfounded. The substantive power of the state to prevent the sale of intoxicating liquor is undoubted. *Mugler v. Kansas*, 123 U.S. 623, 8 Sup. Ct. 273, 31 L. ed. 205."

In the *Joseph S. Finch* case the court used the following language:

"The claim of unconstitutionality is rested in this court substantially on the contention that the statute violates the commerce clause. It is urged that the Missouri law does not relate to protection of the health, safety and morality, or the promotion of their social welfare, but is merely an economic weapon of retaliation; and that,

hence, the Twenty-First Amendment, * * * should not be interpreted as granting power to enact it. Since that amendment, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."

In *Ziffrin, Inc. v. Reeves*,²⁹ the appellant had continuously received whiskey from distillers in Kentucky for transportation to consignees in Chicago, and was operating as a contract carrier under a permit issued by the Interstate Commerce Commission pursuant to the Federal Motor Carrier Act of 1935. In 1938 the State of Kentucky enacted the Alcohol Beverage Control Law, which, among other things, provided that only motor carriers holding a transporter's license from the State of Kentucky could transport distilled spirits or wine. Appellant sought to enjoin the enforcement of this act, having been denied a license by the state. In summing up the appellant's contention, the court said:

"The complaint charges that the control law is unconstitutional because repugnant to the commerce, due process and equal protection clauses of the Federal Constitution in that, under pain of excessive penalties, it undertakes to prevent an authorized interstate contract carrier from continuing an established business of transporting exports of liquors from Kentucky in interstate commerce exclusively. Also: Intoxicating liquors are legitimate articles of interstate commerce unless federal law has declared otherwise."

In disposing of these contentions the court said:

"The Twenty-First Amendment sanctions the

²⁹308 U.S. 132.

right of a state to legislate concerning intoxicating liquors brought from without, *unfettered by the commerce clause*. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect to them * * *."

* * * * *

"Kentucky has seen fit to permit manufacture of whiskey only upon condition that it be sold to an indicated class of customers and transported in definitely specified ways. These conditions are not unreasonable and are clearly appropriate for effectuating the policy of limiting traffic in order to minimize well known evils, and secure payment of revenue. The statute declares whiskey removed from the permitted channels contraband, subject to immediate seizure. This is within the police power of the state; and *property so circumstanced cannot be regarded as a proper article of commerce*. *Sligh v. Kirkwood*, 237 U.S. 52, 59, 35 Sup. Ct. 501, 502, 59 L. ed. 835; *Clason v. Indiana*, 306 U.S. 439, 59 Sup. Ct. 609, 83 L. ed. 858." (Emphasis added)

(e) *The application of fundamental principles and concepts of constitutional law.*

We must start with the axiomatic principle that the Federal Government is one of specifically delegated authority enlarged only by the well established doctrine of implied powers necessary to the exercise of those specifically granted. The Federal Government has no natural—essential—residuary of sovereignty.

The Federal powers are limited by specific grants. The residue of total sovereignty is in the states or in the people. That is an uncontradictable fundamental of the American Federal System. To insure the incontestibility of this constitutional principle the Tenth Amendment to the Constitution³⁰ was adopted. From these constitutional principles we derive these considerations:

(a) Upon the adoption of the Constitution, intoxicating liquor was an article of commerce governed by the same principles as any other article of commerce—under the commerce clause.

(b) The status of intoxicating liquor was changed by the attempts of Congress to redelegate to the states complete control over this subject by the Wilson Act, the Webb-Kenyon Act, and the Reed Amendment—all stripping intoxicating liquor of its interstate character.

(c) The Eighteenth Amendment settled for its lifespan the status of intoxicating liquor. It was no longer an article of commerce. It was—by the people—forbidden in commerce. Congress was denied the power of “regulation.” That which had previously been the subject of regulation was forbidden to Congress in the field of regulation. Congress could only aid the prohibition of the Amendment.

(d) After the Eighteenth Amendment intoxicating liquor had the same status it would have had if it had been forbidden originally in the Constitution. It was

³⁰Article X, Amendments to Constitution of the United States.

not an article of (interstate) commerce in the same sense as if it had been prohibited in the original draft of the Constitution.

(e) When the Twenty-First Amendment was drafted intoxicating liquor was not an article of commerce. It was in the same position as if the Federal Government had never secured any jurisdiction, except such as the Eighteenth Amendment provided.

(f) The Twenty-First Amendment delegated no authority to the Federal Government, *unless it was the duty to insure the enforcement of state laws insofar as state laws made the traffic illegal*. The sole Federal function was to aid in the insurance of the complete sovereignty of the states.

(g) Since "commerce clause" control over intoxicating liquor was withdrawn by the Eighteenth Amendment, it is still denied to the Federal Government because it was not returned by the Twenty-First Amendment.

(h) The Twenty-First Amendment made *state laws* the test of illegality and legality of commerce among the states—in intoxicating liquor.

(i) Therefore, no federal law enactment pursuant to the commerce clause (such as the Sherman Act) can be a criterion of legal or illegal action.

We could go back to the *Young* case and others following to support this proposition. Lest we be charged with begging the question we will refrain. We will content ourselves with more general and fundamental principles.

When the state delegated authority over commerce

among the states to Congress, it did so to accomplish the suppression of these evils to-wit:

- (1) Impediments to freedom of commerce.
- (2) Imposts, duties and onerous burdens.
- (3) Discrimination in favor of residents of a state against those residing in the United States outside of the state.
- (4) The rivalries of local governments.

Summarizing these axiomatic pronouncements, Chief Justice Hughes said:³¹

“It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power conferred to Congress to regulate commerce among the several states. *It is of the essence of this power that, where it exists, it dominates.* Interstate trade was *not left to be destroyed or impeded by the rivalries of local governments.* The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring ‘uniformity of regulation against conflicting and discriminating state legislation.’ By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. * * * Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the

³¹*Houston & Texas Ry. Co. v. U. S.*, 234 U.S. 342.

final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the state, and not the nation, would be supreme within the national field."

We have selected this quotation because it is apt. It recognizes the existence of two co-existent sovereignties both of whom might lay claim to "regulation of commerce among the states." It recognizes that *one* and only one of the conflicting sovereignties *must* possess *dominant* power.

We must admit that under the commerce clause this dominant power (*exclusive* power) was in the Federal Government. But what about the Twenty-First Amendment? What about those Supreme Court decisions which held that under the Twenty-First Amendment the *purpose* (purposes) of the commerce clause was defeated—and the powers revested in the states?

Let us again examine the purposes of the commerce clause and the effect of the Twenty-First Amendment in the light of Supreme Court decisions.

(1) The commerce clause was designed to prohibit imposts and duties among the several states.³²

(a) But under the Twenty-First Amendment imposts and duties imposed by the States are legal and valid and not "limited by the commerce clause."³³

(2) The commerce clause was designed to prevent and prohibit discrimination in favor of the resi-

³²*Minnesota Rate Cases*, 230 U.S. 352; *Robbins v. Taxing Dist.*, 120 U.S. 489.

³³*State Board etc. v. Young's, supra* (299 U.S. 59).

dent of a state and against those residing in the United States outside of such state.³⁴

(a) But under the Twenty-First Amendment such discrimination is legal and no provision of the Federal Constitution can affect it.³⁵

(3) The commerce clause was designed to prevent the impediment of the rivalries of local government.³⁶

(a) But the Supreme Court has said that local governments under the Twenty-First Amendment may exercise their rivalries without fear of the prohibition of the commerce clause against such impediment.³⁷

Thus, the constitutional dominancy of the commerce clause in the Federal Government has been destroyed by the Twenty-First Amendment insofar as intoxicating liquor is concerned and the *dominancy* of *state legislation*, of *state sovereignty*, has been established.

One sovereignty or the other must be dominant—exclusive. Both cannot exist simultaneously. Our constitutional philosophy denies the existence of a concurrent jurisdiction. The Eighteenth Amendment

³⁴*Scott v. Donald*, 165 U.S. 58; *Gregg Dyeing Co. v. Query*, 286 U.S. 472; *Baldwin v. Seelig*, 294 U.S. 511.

³⁵*Mahoney v. Joseph Trinner etc.*, *supra* (304 U.S. 401).

³⁶*Houston & Texas Ry. Co. v. U. S.*, *supra* (234 U.S. 342).

³⁷*Indianapolis etc. v. Liq. Cont. Comm.*, *supra* (305 U.S. 391).

Joseph S. Finch & Co. v. McKittrick, *supra* (305 U.S. 395).

attempted to establish such *concurrent* jurisdiction. But when that amendment was repealed Congress refused to submit to the people a measure which would have continued some concurrent jurisdiction. Twice the Senate defeated such proposition—emphatically. It was never presented to the House or to the people. Congress reflected the sentiment of the people on this subject. While historically the Federal Government had been gaining authority of a centralized character in ever progressive steps—even Congress itself tried to return control over intoxicating liquor to the states. The measures dealing with this subject are opposed to the general trend of the times. Only public opinion could explain this *reverse tendency*.

It should be remembered that we are dealing with regulation of the traffic in *intoxicating liquor* in this indictment. Is the regulation which governs the—Sherman Act—or—the laws of the states involved—both or either are in the same field of regulation. Justice Story, laying down the underlying principles of regulation said:³⁸

“The full power to regulate a *particular subject* implies the whole power, and leaves no residuum. A grant of the whole is *incompatible* with the existence of a right in another to any part of it. A grant of power to regulate necessarily excludes the action of all others who would perform the same operation on the same thing.”
(Emphasis added)

We dare to paraphrase Story—if one of two conflicting sovereignties is given the power to regulate

³⁸Story on the Constitution (5th ed.) Sec. 1067.

a particular subject—that power is denied to the other sovereignty. The logic of the proposition is irresistible.

How shall the legality or illegality of any importation or transportation into a state be judged? What is the criterion? Under the Twenty-First Amendment it is the law of the state. If an act of importation is illegal it is because the law of the state says it is illegal. Conversely, if the act is legal it is because the law of the state does not say it is illegal. The test is the law of the state—not the Federal law.

Before the adoption of the Federal Constitution the state law was supreme as to all commerce—interstate or otherwise.³⁹ The Federal Constitution created the concept of interstate commerce and vested jurisdiction thereof in the Federal Government for acknowledged reasons. The Eighteenth Amendment removed intoxicating liquor from the commerce clause; without impairing the power and authority of the states but relieving the states from the limitations of the commerce clause;⁴⁰ the Twenty-First Amendment in repealing the Eighteenth Amendment *did not* restore the power of the Federal Government but reserved to the states the exclusive control over the regulation of traffic in intoxicating liquor among the states.

From these considerations we believe it to be self evident that the Sherman Act—based on the com-

³⁹See Gavit—The Commerce Clause (1932) page 100, Sec. 56.

⁴⁰*U. S. v. Lanza*, 260 U.S. 420.

merce clause solely—is not applicable to the facts set forth in the indictment and hence the indictment states no facts sufficient to constitute an offense against the United States. The demurrers should have been sustained.

II.

The Twenty-First Amendment is a continuing offer by the people of the United States, to each of the States and Territories to enter and occupy the field of regulating commerce in intoxicating liquor, and when any State or Territory has entered and occupied or preempted such field by appropriate legislative action then such occupation or preemption is exclusive, and the Federal Government has no authority to legislate on the same subject in the same field.

In advancing this proposition, we do not admit any weakness in our first argument. We, however, realize the force of certain factual situations which might be presented to the court with effect. This proposition we frankly consider one of utility. It is an alternative method of reasoning.

We have encountered a reluctance born of the feeling that any physical transportation of a commodity between states must constitute interstate commerce within the meaning of the commerce clause of the Constitution. We realize that throughout the constitutional history of the United States the “concept of interstate commerce” has become so embodied in the judicial and legal mind that the mere statement that a transportation of a commodity between two states does not come within the purview of the commerce clause meets with an immediate and indignant denial.

Because of the wording of the Twenty-First Amendment and the decisions of the Supreme Court pursuant thereto, it must be readily admitted that where the state has enacted a law making a particular act illegal, or where a state law legalizes a specific act or makes mandatory the doing of a definite act, then the state law must govern and federal laws will not apply. However, again because of the peculiar wording of the Twenty-First Amendment it seems inconceivable to most persons that there could be a condition where a state having failed to legislate specifically on the subject, the traffic in intoxicating liquor should be free of any regulation. Perhaps the horrors of such a situation would not be quite so obvious if the commodity dealt with were something other than intoxicating liquor.

It is, of course, a proper answer to any such argument that if the states are vested with the exclusive right to regulate commerce among the states in intoxicating liquor, then the state has the right to determine whether that commodity should be subjected to any regulation at all, and if so, to what extent, and the state has this right without any superimposed control in the Federal Government.⁴¹

⁴¹In dealing with intoxicating liquor in *Leisy v. Hardin*, 135 U.S. 100, the court said:

“Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the states may be exerted * * * but, on the contrary * * * it (congress) thereby in-

The reverse of this very situation developed early in the determination of the power of the federal government under the commerce clause. The federal courts found that many difficult questions arose where the state, in the proper exercise of its police power, enacted statutes which had the effect of either directly or indirectly affecting or burdening interstate commerce. Out of a multitude of such conflicts there developed certain principles.

(1) Where the subject of the conflict is national in character in the sense that uniformity of regulation is necessary or desirable throughout the United States, then the authority of Congress under the commerce clause is exclusive to the extent that if Congress fails to act within the field involved, such failure is tantamount to an affirmative declaration that there should be no regulation within that field, and the states are powerless to act.

(2) If the subject matter of the controversy is not national in character, inherently requiring uniformity of regulation throughout the United States, but is of local nature then if Congress fails to act the states, in the proper exercise of their police power, can enact statutes within the field which affect interstate commerce, but once Congress enters the field and provides regulation, then the states can no longer legislate in that field in any manner which directly or indirectly burdens, impairs or impedes interstate commerce, or which conflicts with congressional action.

icates its will that such commerce shall be free and untrammelled."

The Supreme Court has stated this principle in this language:

“But that was because Congress, although empowered to regulate that subject, had not acted, and because the subject is one which falls within the police power of the states in the absence of action by Congress. * * * The inaction of Congress, however, in no wise affected its power over the subject. * * * and now that Congress has acted, the laws of the states, insofar as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. * * *”⁴²

“Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state * * *. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist. * * *”⁴³

Drawing an analogy between the present conflict created by the Twenty-First Amendment and the commerce clause is, of necessity, imperfect because

⁴²Second Employer's Liability Cases, 223 U.S. 1, at 54-55.

⁴³*Adams Exp. Co. v. Croninger*, 226 U.S. 491, at 504-5.

See also *N. Y. Cent. R. R. Co. v. Winfield*, 244 U.S. 147; *Chi. R. I. & Pac. Ry. Co. v. Hardwick, etc.*, 226 U.S. 426.

the two sovereignties being dealt with in reverse positions are not sovereignties on the same plane. In construing the power of the federal government under the commerce clause, the court was dealing with a delegated authority to be strictly construed, the people having reserved to themselves or to the states all powers not delegated. From this principle sprung the conclusion that if Congress had not acted in a field which did not inherently require uniformity of regulation, then it followed that a reserved power still rested in the states, particularly if the subject concerned the health, safety or morals of the people. The reverse of this proposition cannot, however, be true—that is, if the people delegate to the states and deny to the federal government a part or the whole of any specific power, there exists in the federal government no residue or natural depository of sovereignty out of which it can claim a power reserved from the delegation to the states.

However, for the purpose of argument, let us assume that the principles established with respect to the exercise of authority by the Federal Government under the commerce clause are applicable in the reverse situation created by the Twenty-First Amendment. Certainly the Twenty-First Amendment conclusively establishes that the commerce in intoxicating liquor is not a subject national in character requiring uniformity of regulation throughout the United States. That consideration was one of the underlying causes of the repeal of the Eighteenth Amendment and the enactment of the Twenty-First, as we have heretofore demonstrated. The language

of the Twenty-First Amendment conclusively presumes varied treatment in each of the states.

From the mere statement of this principle two conclusions can be drawn—First, that the delegation of authority to the states by the people under the Twenty-First Amendment dealing with a subject calling for diverse treatment by each state, must be exclusive from its very nature, just as congressional jurisdiction is exclusive with respect to subjects necessarily requiring uniform treatment nationally.

Second, that the power delegated to the states under the Twenty-First Amendment by the people dealing with a subject not national in scope creates the situation that the federal law will continue to apply until the states have entered the field, but once the states enter the field then the federal no longer applies.

Assuming for the sake of argument that this latter proposition is sound, we will demonstrate that with respect to all of the charges of the indictment the states involved have entered the field both generally and specifically in such manner as to exclude the possibility that the Sherman Act does apply.

State Acts Generally Regulating Subject Matter

Each of the states involved in this indictment has adopted a comprehensive liquor control statute. In Washington, Oregon and Idaho the acts are monopolistic with respect to all spiritous liquors and are in restraint of trade as to beer. In the State of California the statute is not monopolistic, provides a licensing system for all alcoholic beverages, and is in restraint of trade as to beer.⁴⁴

⁴⁴See Notes 6 and 7, *supra*.

Referring generally to the restraints of trade with respect to beer, all of these regulatory states control, by specific enactment of the legislature or by regulation of the liquor control authority adopted pursuant to statute, price, advertising, trade promotions, labeling and containers, define who may buy, who may sell and under what conditions, determine the character of each person in the retail, wholesale or manufacturing trade, prohibit an identity of interest of any character between wholesalers and manufacturers on the one hand and retailers on the other.⁴⁵

All of these acts are designed to restrict and restrain free competition and the use of methods designed to promote or increase consumption, acts generally known as sales stimulants, and methods generally used by manufacturers and distributors of commodities to induce retailers to push the sale of their particular brands.⁴⁶

Each of these acts covers every business transaction in beer within the geographical boundaries of each state and leaves no act which is not specifically covered by statute or regulation. Each of these acts controls carriers in both inter and intrastate commerce in the transportation of intoxicating liquor, including beer, setting forth the methods by which and the conditions upon which they may transport and deliver these commodities. Each of these acts defines who may bring into or receive within the state intoxicating liquor and upon what conditions such importation shall be made. In three of these states no

^{45, 46}See Appendix II for analysis of these provisions.

manufacturer of beer may ship into the state any of its products unless it has first secured from the state a certificate of approval giving it the right to send its product into such states. There is no function or operation in the commerce in intoxicating liquors which is not specifically dealt with in each of these acts.⁴⁷

Each of the states involved in this indictment has, therefore, entered the field of regulating the commerce in intoxicating liquor, and in a comprehensive manner. It must follow from this, therefore, that the Sherman Act, which attempts to regulate the same subject matter in the same field, can no longer operate with respect to intoxicating liquor insofar as the trade and commerce within or between Washington, Oregon, Idaho and California is concerned.

Perhaps no more obvious conflict of sovereignties could be presented than that which here appears. The Sherman Act in effect says that there shall be free and unrestrained competition in the traffic in intoxicating liquor, while the acts of the states say that there shall be no free, open and unrestrained competition in intoxicating liquor. Under these circumstances, and under the Twenty-First Amendment, who shall determine which economic policy shall apply to this commerce?

State Acts Specifically Regulate Matters Alleged in Indictment

In addition to generally occupying the field regulating the subject matter covered by the indictment, the

⁴⁷See Appendix II for analysis of these provisions.

laws of the four states involved specifically deal with the acts alleged to constitute the conspiracy in violation of the Sherman Act. We will set forth the paragraphs of the indictment dealing with each of the subject matters and will direct the court's attention to the provisions of state laws dealing with these same specific subjects, and will, in an appendix hereto, set forth *in extenso* the provisions of the state laws and regulations to which we here refer.

Prices

Paragraph 16 (Tr. 18) charges generally a violation of the Sherman Act with respect to prices. Paragraph 17 (Tr. 19) of the indictment purports to set forth the means by which the alleged violation occurred. Sub-paragraphs (b), (c), (f), (i), (j), (k), (m), (n) and (o) deal with the subject of prices, price control, price posting, zoning for pricing purposes, enactment of and compliance with state requirements, and other alleged restraints with respect to prices. Each of the states involved has enacted, by legislative act or regulation pursuant thereto, provisions controlling prices, the fixing of prices, compliance with prices, and other matters relative thereto. In the State of Washington, by legislative enactment,⁴⁸ the Washington State Liquor Control Board is empowered to regulate generally and specifically with respect to "regulating the sale of beer * * *." By regulation the Washington State Liquor Control Board has defined and established zones for the pur-

⁴⁸Rem. Rev. Stat. §7306-79—See Appendix III for text of law.

pose of fixing and establishing prices, has required that every importer, wholesaler and manufacturer of beer shall post prices on a delivered basis to retail licensees in each zone and allowance for the return of empty containers, requiring that beer be sold only at prices as posted, and that they may not be changed except after 10 days from the time a new posting is filed with the Board, and prohibiting any prices involving quantity discounts. This regulation further requires the filing of a memorandum or written contract of every agreement between a beer wholesaler or importer on the one hand and a brewer manufacturing the product on the other, setting forth the prices and all terms of sale, and requiring that no sale can be made unless such agreement or memorandum is on file, and that no changes shall be made until a new contract or memorandum is filed with the Board. This regulation further provides that all such postings and contracts shall be open to inspection, and shall not be confidential.⁴⁹

The State of Oregon, by legislative enactment, has empowered the Oregon Liquor Control Commission "to control the * * * sale, purchase, transportation, importation * * * of alcoholic liquor * * *," and to adopt regulations.⁵⁰

By regulation the Oregon Liquor Control Commission requires the posting of prices by trade areas, both

⁴⁹Regulation 49, Wash. St. Liq. Cont. Bd.

See Appendix III for text.

⁵⁰Ore. Compl. L. Ann. Sec. 24-106.

See Appendix III for text.

as to retail and wholesale sales, permits such filings only on or before the 20th day of each month preceding the month in which such prices shall become effective, and which may be changed and modified only by filing another schedule on or before the 20th day of any subsequent month, with such change becoming effective on the 1st day of the following month, and providing that when any amended schedule is filed by any licensee on or before the 20th of the month other licensees shall have the right to meet such new filing, but not file any lower prices, at any time before the 1st day of the month immediately following, and requiring adherence to prices so filed, and providing for the uniformity of such prices among trade buyers of the same class in the same trade area. This regulation also provides for the posting of prices on malt beverages to be closed out upon condition that the licensee filing such closing out prices shall not handle the same item for a period of twelve (12) months thereafter.⁵¹

The State of California, by legislative enactment,⁵² provides that each manufacturer, importer and wholesaler of beer shall file a written schedule of prices to be charged, such schedule of prices to be charged only upon 10 days notice by the filing of a new or amended schedule, but providing that other licensees may meet but not post lower prices than such new filing to become effective upon the same date as such

⁵¹Regulation 10, Ore. Liq. Cont. Com. See Appendix III for text.

⁵²Sec. 38e. See Appendix III for text.

new filing, that such postings shall be open to public inspection, and that such prices as filed shall be strictly adhered to, and providing that the State Board of Equalization may adopt other rules and regulations to foster and encourage orderly wholesale marketing and distribution of beer.

By legislative enactment in the State of Idaho⁵³ it is provided that all licensees shall file schedules of prices uniform for the same class of buyers in the same trade area, that such prices shall be on a delivered basis, that there shall be filed return allowances for containers, that any change or modification of such schedule of prices shall become effective not less than ten (10) days after the filing of new or amendatory schedules, that all prices must remain in effect for a minimum of ten (10) days, that price schedules shall be open to public inspection, and that all prices shall be adhered to strictly.

Classification of Purchasers

Paragraph 17 (d) (Tr. 21) of the indictment charges that the defendants violated the Sherman Act by establishing classifications of purchasers of beer and the prices to be charged each such classification. Each of the states involved has adopted definitions of manufacturers, wholesalers, importers and retailers. Each of the price control regulations previously referred to requires classification of purchasers and sellers of beer into manufacturers, wholesalers, importers and retailers, and requires a distinctive price

⁵³Sec. 6, Ch. 132, L. 1935 as amended. See Appendix III for text.

treatment of each classification and by each classification.⁵⁴

Control of Containers

Paragraph 17 (e) (Tr. 21) alleges that uniform types of bottles, containers and packages were used in the Pacific Coast Area and uniform refunds and allowances for the return of empty containers were established. The laws of Washington and Idaho provide for the regulation of bottles, containers and packages, a regulation of the Washington Liquor Control Board specifies the sizes of bottles, cases and barrels which may be used, and the Idaho statute contains a specification of the size of bottles and barrels. The State of California by statute provides the maximum size for bottles and minimum size for barrels.

Each of the laws and regulations forbids the giving of a rebate by any means. Uniformity of refunds and allowances for interchangeable containers is a necessary result of anti-rebate provisions. Any manufacturer or wholesaler who paid a larger amount for the refund upon the return of empty bottles or containers than was originally paid by the licensee would be effecting a rebate to the extent of such excess.⁵⁵

Coercion of Wholesalers

Paragraphs 17 (g) and (m) (Tr. 22-26) allege that the defendants coerced wholesalers, distributors,

⁵⁴See Appendix III for texts of price control provisions.

See Appendices II and III for references to classifications.

⁵⁵Texts in Appendix III.

importers and retailers to adhere strictly to price levels established and refused or suspended shipments of beer to those who failed. Undoubtedly this allegation is intended to apply principally to the State of Washington and the district in which the indictment was returned. The statute of the State of Washington provides that manufacturers shall be responsible for the conduct of wholesalers handling their product and may be punished for violations by the wholesaler, even though there is no evidence that the manufacturer participated in the violation, the infliction of the punishment being wholly within the discretion of the Liquor Control Board. Furthermore, the price posting regulation of the Washington Liquor Control Board requires that the manufacturer or importer post the price at which their respective products shall be sold in the various zones in the State of Washington, and wholesalers are required to follow such price postings. There is no provision for a wholesaler making an independent posting of his own.

Similarly the law of California provides that any person participating or aiding in the violaton of the price posting provisions of the statute shall be guilty of a violation to the same extent as the person committing it.⁵⁶

Distressed Beer

Paragraph 17 (h) (Tr. 23) alleges that the defendants agreed to and did repurchase beer from wholesalers, distributors, importers and retailers of what it alleges the industry describes as distressed

⁵⁶Text in Appendix III.

beer. Regulation 50 of the Washington State Liquor Control Board, and Regulation 10C of the Oregon Liquor Control Commission, describe in detail the procedure to be followed in the repurchase of damaged or distressed merchandise. A further paragraph of Regulation 10A of the Oregon Regulations provides that a wholesaler who desires to close out a particular brand at other than his posted price may do so on special permission from the Oregon Liquor Control Commission, but if he avails himself of this provision he may not sell the item so closed out for a period of twelve months thereafter. This regulation also refers to distressed beer. Sec. 55.5 of the California law provides that before any licensee sells as distressed merchandise a trade marked or branded beer subject to a fair trade contract he shall offer such beer to the manufacturer.⁵⁷

Inducement of Outside Brewers

Paragraphs 17 (n) and (o) (Tr. 27) allege that the defendants attempted to and did induce brewers located outside the Pacific Coast Area to abide by price levels agreed upon and posted, and to refrain from selling to wholesalers who failed to adhere to such prices as posted. The laws of Washington and Idaho and a regulation in California require all outside brewers to secure from the respective liquor control authorities what is known as a certificate of approval or of compliance. This certificate is issued after an application by an outstate manufacturer for permission to sell his product within each of the re-

⁵⁷Text in Appendix III.

spective states and conditioned upon his filing with the liquor control authority a written agreement by which the manufacturer agrees that he will abide by all of the provisions and the laws and regulations of each state, and will cause all of his agents to do so. If such manufacturer fails to live up to the agreement the penalty provided is the cancellation or suspension of the certificate and refusal of permission to ship any more of his product into the state. His shipments, therefore, must be made only to designated licensees and he must abide by all of the price posting and similar regulations, and in those cases where the law so provides he must accept the responsibility for those who handle his product. Both he and his representatives must adhere to the prices posted, and if they depart therefrom such departure would constitute a violation which would render the certificate subject to suspension or cancellation.⁵⁸

In the three states mentioned no importer can purchase or place an order for the product of any manufacturer located outside of the state unless he first indicates his intention so to do to the liquor control authority and ascertains that a certificate of approval is outstanding.

Paragraph 17 (f) (Tr. 21) alleges that the defendants employed administrators, supervisors and investigators to police the Pacific Coast Area and to levy fines and penalties ostensibly for alleged violations of the provisions of the liquor control statutes and regulations of the liquor control authorities, but which

⁵⁸Text in Appendix III.

were for the purpose of maintaining adherence to prices. Of course, adherence to prices as posted is required by each of the laws and regulations previously referred to, and any aid that could be given to the State to insure adherence to the laws and regulations could not be a violation of law. We are unable, of course, from the allegation to determine in what area the Government intended to charge that this practice had been followed. Sec. 38 (e) of the law of California provides that trade associations representing a majority of the beer manufactured in that state are specifically privileged to enforce or aid in the enforcement of the price posting provision.

There are numerous other sections of the statutes and regulations which directly or indirectly relate to the matters covered in the indictment. We have attempted to set out those which most directly relate to the same subjects covered by the individual paragraphs of the indictment, and those merely for the purpose of illustrating the principle hereinbefore set forth—that the states have completely and specifically occupied the field of regulation with respect to the matters covered in the indictment.

In support of our second proposition it is evident that the states have fully occupied the field of regulation of intoxicating liquor and that the Sherman Act is no longer applicable.

COUNT II

Count II of the indictment, as previously noted, charges a violation of Sec. 3 of the Sherman Act and contains allegations similar to those in Count I with respect to commerce between the states in the Pacific Coast Area and the Territory of Alaska.

In the Twenty-First Amendment, as also in the Wilson and Webb-Kenyon Acts, territories are placed in the same category as states with respect to this particular subject matter. Immediately after the ratification of the Twenty-First Amendment the Territory of Alaska passed an act regulating the sale of beer and wine,⁵⁹ and an act creating a Board of Liquor Control.⁶⁰ These enactments were in turn specifically ratified by Congress⁶¹ in an act which provided that the legislative power of the Territorial Assembly be extended to include the regulation of intoxicating liquor traffic, and authorizing the legislature to delegate its authority to a board or commission, with power to make rules and regulations. This act was, of course, in aid of the Twenty-First Amendment.

Subsequently the territorial legislature adopted a new liquor control act,⁶² by which it limited the sale of intoxicating liquors to and by licensees, required brewers and wholesalers whose plant or principal place of business is located outside the territory to obtain a wholesaler's license and to establish a principal

⁵⁹Ch. 71 L. 1933.

⁶⁰Ch. 109 L. 1933.

⁶¹Secs. 2 and 3, Repeal Act for Alaska, 48 Stat. 583.

⁶²Ch. 78 L. 1937.

place of business and designate a resident agent within the territory, and providing for a malt beverage importer's license. This act also prohibits the ownership of any interest in a beverage dispensary or retail liquor store by a wholesaler or brewer, and prohibits the direct or indirect financing of or supplying of equipment or furnishings to any retailer by a wholesaler or brewer.

Since the Twenty-First Amendment places territories and states in the same category, what we have heretofore already said with respect to the states involved applies equally to the Territory of Alaska.

With respect to this count it should perhaps be called to the attention of the court that the District Court imposed a fine of \$1.00 on each of the defendants.

CONCLUSION

The appellants respectfully submit that the several demurrers filed by them should be sustained and that this action should be dismissed.

Respectfully submitted,

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APPENDIX I

SECTIONS 1 AND 3 OF THE SHERMAN ACT

26 Stat. 209

“Sec. 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.*

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.”

“Sec. 3. *Trusts in Territories or District of Columbia illegal; combination a misdemeanor.*

“Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.”

TWENTY-FIRST AMENDMENT

“Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

“Section 2. The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

“Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.”

EIGHTEENTH AMENDMENT

“NATIONAL PROHIBITION.—Resolved by the senate and house of representatives of the United States of America in congress assembled (two-thirds of each house concurring therein), that the following amendment to the constitution be, and hereby is, proposed to the states, to become valid as a part of the constitution when ratified by the legislatures of the several states as provided by the constitution:

“Sec. 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States, and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

“Sec. 2. The congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

“Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the constitution, within seven years from

the date of the submission hereof to the states by the congress.”

WILSON ORIGINAL PACKAGES ACT

“Sec. 121. *State statutes as operative on termination of transportation; original packages.* All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.”

WEBB-KENYON ACT

“Sec. 122. *Shipments into states having dry laws; prohibition.* The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.”

APPENDIX II.

ANALYSIS OF LIQUOR CONTROL ACTS AND REGULATIONS OF WASHINGTON, OREGON, CALIFORNIA AND IDAHO

(Laws referred to herein are as follows: Washington—Rem. Rev. Stat. and Regulations of Washington Liquor Control Board.; Oregon—Comp. Laws Ann. and Regulations of Oregon Liquor Control Comm.; California—Chap. 330, Laws 1935, as amended by Ch. 758, Laws 1937, Rules State Board Equal.; Idaho—Ch. 132, Laws 1935, as amended by Ch. 48, Laws 1937 and Ch. 242 Laws 1939.)

The laws of Washington and Oregon establish a liquor control board or commission with general and specific powers to adopt regulations which when adopted have the force and effect of law (Wash. 7306-79; Ore. 24-106).

The California statute, at various places, empowers the State Board of Equalization to make rules concerning specific subjects. These are, however, not gathered under any one head in any one section.

Licenses are required for all persons manufacturing, importing or buying or selling intoxicating liquor. Each act defines manufacturer or brewer, importer, wholesaler, and various classes of retailers (Wash. 7306-23, *et seq.*; Ore. 24-118, *et seq.*; Cal. Sec. 5, *et seq.*; Idaho, Secs. 1 and 3).

Three of the laws require salesmen to have licenses, define their rights and duties, and prohibit anyone from soliciting or performing the work of a salesman without possessing such license (Wash. 7306-23-1; Ore. 24-118-16 (6); Idaho Sec. 6 (8).)

Each of the statutes requires a license to import beer into the state, and prohibits anyone except the holders of such licenses from importing (Wash. 7306-23-G; Ore. 24-118 (1) and (6); Cal. Secs. 2 (k) and 6 (d); Idaho, Sec. 1 (c) 3).

Common carriers are required to comply with provisions of the acts in the transportation of intoxicating liquor (Wash. 7306-56; Cal. Secs. 49 and 49.2; Idaho, Secs. 1 (i) and 4 (3) (a).)

The contents and requirements for labeling are regulated (Wash. 7306-44; Ore. 24-146; Cal. Sec. 53.5 and Rule 30).

Advertising by various means is subjected to regulation (Wash. 7306-43 and Reg. 22-25 and 119 to 127; Ore. Reg. 7; Cal. Secs. 53.6 and 55; Idaho, Sec. 6 (a).)

The extension of credit is prohibited or regulated (Wash. Reg. 41 and 51 (a); Ore. Reg. 9; Cal. Sec. 55.8).

Each of the acts and regulations adopted pursuant thereto prohibits a manufacturer, wholesaler or importer from having any financial interest, direct or indirect, in any licensed retail business, or in any property on which a retail business is conducted, prohibits the giving or advancing of money or money's worth to any retailer under any arrangement, prohibits a manufacturer, wholesaler or importer from having any interest in any retail license, and prohibits a manufacturer or wholesaler from selling liquor at retail, prohibits the soliciting, giving or offering of any gifts, discounts, loans of money, premiums, rebates or furnishing, renting, lending or selling any

equipment, fixtures or supplies, and prohibits a retail licensee from soliciting or receiving or accepting any of the foregoing (Wash. 7306-90, Reg. 18; Ore. 24-137, 24-202 to 205, Reg. 10 (d); Cal. Sec. 54; Idaho Sec. 6 (9).)

Consignment sales are prohibited in California (Sec. 54) and exclusive contracts between manufacturer or wholesaler and retailer are prohibited in Washington (Reg. 17). Sales for future delivery are prohibited in Oregon (Reg. 10 (d).)

In Appendix III we have set out the texts of the price control and container control provisions, the sections covering manufacturers' responsibilities for wholesalers' conduct, distressed beer, and certificates of approval or compliance.

The laws and regulations contain conditions surrounding warehousing, importation and exportation of beer other than those above referred to (Wash. Reg. 52 to 55 inc.; Cal. Secs. 24.26 and 24.27, Rule 10 and Sec. 6 (1); Idaho Sec. 6 (4).)

APPENDIX III

(Laws referred to herein are as follows: Washington—Rem. Rev. Stat. and Regulations of Washington Liquor Control Board.; Oregon—Comp. Laws Ann. and Regulations of Oregon Liquor Control Comm.; California—Chap. 330, Laws 1935, as amended by Ch. 758, Laws 1937; Idaho—Ch. 132, Laws 1935, as amended by Ch. 48, Laws 1937 and Ch. 242, Laws 1939.)

PRICE CONTROL PROVISIONS

WASHINGTON LAW

“Sec. 7306-79. *Board has power to make regulations.* 1. For the purpose of carrying into effect the provisions of this act according to their true intent or of supplying any deficiency therein, the board may make such regulations not inconsistent with the spirit of this act as are deemed necessary or advisable. All regulations so made shall be a public record and filed in the office of the secretary of state, together with a copy of this act, shall forthwith be published in pamphlets, which pamphlets shall be distributed free at all liquor stores and as otherwise directed by the board, and thereupon shall have the same force and effect as if incorporated in this act.

“2. Without thereby limiting the generality of the provisions contained in subsection (1), it is declared that the power of the board to make regulations in the manner set out in that subsection shall extend to

* * * * *

“r. prescribing the conditions, accommodations and qualifications requisite for the obtaining of licenses to sell beer and wines, and regulating the sale of beer and wines thereunder;”

“(49) *Beer Price Posting—Filing Contracts.* (a) *Price Posting.* Within the meaning of this regulation, the term ‘zone’ shall mean such ‘zones’ as shall from time to time be fixed and adopted by the board as trade areas within and for which price postings shall be made and filed as in this regulation provided.

“Every licensed brewer and every beer importer shall file with the board at its office in Olympia price postings showing the wholesale prices at which any and all brands of beer manufactured by such brewer or imported by such beer importer shall be sold in each and every zone, which prices shall be uniform for all retail licensees in any particular zone. All price postings shall be made upon forms prepared and furnished by the board and shall set forth:

“(1) All brands, types, packages and containers of beer offered for sale by such brewer or beer importer.

“(2) The delivered sale prices thereof to retail licensees within each and every zone, including allowances, if any, for returned empty containers.

“No beer wholesaler shall sell or offer to sell any package or container of beer to any retail licensee at a price differing from the price for such package or container as shown in the price posting filed by the brewer manufacturing such beer or by the beer importer importing such beer and then in effect.

“No price posting shall become effective until ten days after the actual filing thereof with the board.

“No price postings involving quantity discounts shall be made.

* * * * *

“(b) *Filing Contracts.* Every licensed brewer shall file with the board at its office in Olympia a copy of every written contract and a memorandum of every oral agreement which such brewer may have with

any beer wholesaler handling beer manufactured by such licensed brewer, which contracts or memorandums shall contain all terms of sale, including all regular and special discounts; all advertising, sales and trade allowances; all commissions, bonuses or gifts and any and all other discounts or allowances. Whenever changed or modified the changed or modified contracts or memorandums shall forthwith be filed with the board.

“Every beer importer shall file with the board at its office in Olympia a copy of every written contract and a memorandum of every oral agreement which such importer may have with any out-of-state brewery whose beer such importer imports and with any beer wholesaler handling beer imported by such importer, which contracts or memorandums shall contain all terms of sale, including all regular and special discounts; all advertising, sales and trade allowances; all commissions, bonuses or gifts and any and all other discounts or allowances. Whenever changed or modified the changed or modified contracts or memorandums shall forthwith be filed with the board.

“No licensed brewer shall sell beer manufactured by such brewer to any beer wholesaler until copies of such written contracts or memorandums of such oral agreements with such wholesaler are on file with the board.

“No beer importer shall sell any beer imported by such importer to any person whatsoever until copies of such written contracts or memorandums of such oral agreements with the out-of-state brewer manufacturing such beer are on file with the board; nor shall any beer importer sell any beer imported by such importer to any beer wholesaler until copies of such written contracts or memorandums of such oral agreements with such beer wholesaler are on file with the board.

“(c) All price postings, contracts and memorandums filed as required by this regulation shall at all times be open to inspection to all trade buyers within the state of Washington and shall not within any sense be considered confidential.

“(d) Any provision of this regulation may by order of the board be suspended or modified without notice to meet emergencies.”

OREGON LAW

“Sec. 24-106. *Liquor traffic: Property: Commercial transactions: Licenses: Taxes: Enforcement of law: Adoption of regulations: Advertising by dealers: Contracts: Insurance.* The function, duties and powers of the commission shall include the following:

* * * * *

“(d) To control the manufacture, possession, sale, purchase, transportation, importation and delivery of alcoholic liquor in accordance with the provisions of this Act;

* * * * *

“(h) To adopt such regulations as are necessary and feasible for carrying out the provisions of this Act, and to amend or repeal such regulations. When such regulations are adopted as herein provided they shall have the full force and effect of law.”

“REGULATION 10. A—*Posting of Beer Prices*—Licensees of the commission engaged in the business of soliciting the sales of, selling or distributing malt beverages for resale within the state of Oregon shall file with the commission at its Portland, Oregon, office a written schedule (in quadruplicate) of prices to be charged by such licensee for all malt beverages offered for sale within the state of Oregon, which said schedule of prices shall be uniform for the same class of trade buyers in the same trade area within the

state and shall set forth, (a) all brands and types of products offered for sale, (b) the delivered sale price for each size of container to retail licensees in each trade area of the state, (c) prices or maximum allowance or discounts to wholesale licensees, and (d) any allowance granted for returned containers. Such schedule of prices shall be filed with the commission on or before the 20th day of the month preceding the month in which such prices shall be in effect. A schedule of prices so filed may be changed or modified by filing with the commission at its Portland office, on or before the 20th day of any month, an amended schedule of prices which amended schedule when filed shall become effective on the first day of the following month; provided, however, that if a licensee files a schedule of prices, for all malt beverages, or an amended schedule of prices on or before the 20th of the month, all other licensees having a schedule of prices on file may file amended schedules to meet such new schedule of prices, but not lower than such new scheduled prices, at any time thereafter and before the 1st day of the month immediately following; and such amended schedules so filed shall be in effect from and after the first day of such month. Such schedule of prices shall not be withdrawn, changed or modified except in the manner hereinabove provided. When a price schedule, or an amendment or modification thereof, is filed it shall be open to public inspection. From and after the effective date of price schedules filed as hereinabove provided, the licensee filing such schedule shall make sales at the prices scheduled and at no other prices. If any licensee shall make a sale of malt beverages at any price which is a departure or variance from such licensee's posted price for such beverage such sale shall be regarded and construed as the giving of financial assistance within the meaning of the Oregon liquor control act, as amended,

Chapter 490, Oregon Laws, 1937, and the regulations of the Oregon liquor control commission.

“(2) Notwithstanding the foregoing provisions, a licensee may be permitted to make sales at other than posted prices for the purpose of closing out a brand of malt beverages, providing the licensee shall first apply in writing to the commission. Such application shall contain the brand name, the quantities of each size of container and the price thereof and shall contain a statement that the licensee will not handle such items for a period of twelve (12) months thereafter. Upon the filing of such application the Administrator shall prescribe the terms and conditions under which such closeout sales may be made, which shall include the name of the proposed vendee.

“(3) During the emergency created by the war, the Administrator is hereby authorized and directed, to receive at any time from a licensee authorized to sell or distribute malt beverages for resale, a schedule of prices for any brand or kind of malt beverages not previously offered for sale by such licensee and not already posted and being sold in the same trading area, and upon the filing of such schedule of prices to permit the sale of such malt beverages in sealed containers (bottles) immediately thereafter and without regard to provisions of Regulation 10 hereinabove set out; provided, however, that after the initial filing of a schedule of prices as in this paragraph provided, thereafter amendments to such schedule shall be filed in accordance with paragraphs 1 and 2 of Regulations 10. (Par. (3) *as added August 14, 1942, effective August 24, 1942*).”

CALIFORNIA LAW

“Sec. 38e. Each manufacturer, importer and wholesaler of beer shall forthwith file and thereafter maintain on file with the board, in triplicate and in such form as the board may provide a written schedule of selling prices charged by such licensee for beer sold and distributed by such licensee within the State of California for delivery and use therein; provided, however, that such schedule of prices so filed, may be changed or modified from time to time by the licensee filing the same, by filing with the board a new and complete schedule of such prices or an amendment thereto of changed or modified prices as the board may by regulation require. The first schedule of prices filed by a licensee shall be effective immediately upon filing but an amendatory schedule or amendments to a prior filed schedule shall not become effective until ten (10) days after the filing date thereof; provided, that if any licensee has filed a new schedule to meet lower posted and filed competing prices in a trade area, and such prices thus posted are not lower than such competing prices sought to be met, then such new schedule or amendments shall go into effect immediately if such competing prices are already effective, or at the same time as such competing prices become effective. Such price schedule so filed shall be subject to public inspection and shall not in any sense be considered confidential and each said licensee shall retain in his licensed premises for public inspection a copy of his effective posted and filed schedule. Upon the filing of an original schedule of prices and after the effective date of any schedule of amendatory prices, all prices therein stated shall be strictly adhered to by the filing licensee and any departure or variance therefrom by a licensee of his prices so filed and posted and in effect shall constitute and be a misdemeanor, providing that the violation

of posted prices as to each article covered by a particular sale or transaction shall not constitute a separate and single misdemeanor or violation of this section as to each such article, but each such sale or transaction involving a violation of posted prices under this section shall constitute but a single offense or violation of this section regardless of the number of articles covered by such sale or transaction.

“Any director, officer, agent or employee of any licensee who knowingly assists or aids in the violation of this section or any effective posted price or any rule or regulation of the board passed to carry out the provisions of this section shall be guilty of such violation equally with the licensee.

“The board may adopt such other rules and regulations as will foster and encourage the orderly wholesale marketing and wholesale distribution of beer; provided, that no such action shall be taken by the board except after public hearings and ten (10) days notice to all licensed manufacturers of beer in California of the time and place of such hearing and of the character of the action intended to be taken by the board.”

IDAHO LAW

“Sec. 6. *Unlawful practices.* * * * *

“(5) All licensees of the commissioner engaged in the business of selling or distributing beer for resale within the State of Idaho shall file with the commissioner a written schedule of prices to be charged by such licensee for beer sold or distributed within the State of Idaho, which schedule of prices shall be uniform for the same class of buyers in the same trade area within the State and shall set forth (a) all brands and types of products offered for sale; (b) the delivered sale price thereof in the several trade areas

of the state to the various classes of buyers; and (c) any allowance granted for returned containers. Such schedule of prices so filed may be changed or modified from time to time by filing with the commissioner a new schedule of prices, not less than ten days prior to the effective date thereof, and upon the filing of said new prices the commissioner shall give a notice thereof to all licensees as appear of record, selling or distributing beer within the State of Idaho. Such scheduled prices so filed may not be withdrawn prior to their effective date and upon becoming effective shall remain in effect for a minimum period of ten days. Such price schedules so filed shall be subject to public inspection and shall not be considered confidential. Upon the filing of the original schedule of prices, and after the effective date of any schedule of prices amendatory thereto, all prices therein stated shall be adhered to strictly, and any departure or variation therefrom shall be regarded and construed as the giving of financial assistance within the meaning of this Act."

CLASSIFICATION OF PURCHASERS

Each of the laws define and separately license manufacturers, wholesalers (or distributors), importers and retailers as described in Appendix II *supra*.

Each of the price posting provisions referred to and quoted in this appendix require different price treatment for each class of trade buyer in each trade area or zone.

Each law requires that the identity of wholesalers and retailers be kept separate as set forth in Appendix II.

In addition California has the following provision:

"Sec. 38e. * * * *

“No manufacturer, importer or wholesaler mentioned in this section shall be prohibited the right of choice of customers, nor shall any such licensee be prohibited from dividing his customers into functional classes and establish different prices for the same article for such different functional classes being based upon the manner in which such classes sell beer, as wholesaler or retailer.”

CONTAINER CONTROL PROVISIONS

Washington

“Sec. 7306-69. 1. The board, subject to the provisions of this Act and the regulations, shall

* * * * *

“d. determine the nature, form and capacity of all packages to be used for containing liquor kept for sale under this Act;”

“Reg. 44. *Packages—Classification.* No manufacturer, distributor or wholesaler shall, without permission of the board, adopt or use any packages or containers for beer differing in sizes and capacities from the following classification for taxing purposes, to-wit:

“Barrels—Whole barrels, $\frac{1}{2}$ barrels, $\frac{1}{4}$ barrels.

“Packages—12 11-oz., 12 12-oz., 24 11-oz., 24 12-oz., 12 22-oz., 12 24-oz., 6 64-oz., 12 32-oz., 12 64-oz., 24 32-oz., 48 11-oz., 48 12-oz.”

California

“Sec. 53.6. * * * * No beer intended for sale in the State of California, except for export, shall be contained in bottles, jugs or cans having a capacity of more than 64 ounces, nor shall beer in bottles, jugs or cans of a capacity in excess of 64 ounces be sold

to or purchased by an on-sale or off-sale licensee in the State of California, provided that nothing in this paragraph shall be construed to prohibit the possession or sale by a qualified licensee of draft or unpasteurized beer from or in metal or wood kegs of a capacity of three and one-half ($3\frac{1}{2}$) gallons or more."

Idaho

"Sec. 6. *Unlawful practices.* * * * *

"(6) No dealer or wholesaler shall purchase, receive or resell any beer, except in the original container as prepared for the market by the brewer at the place of manufacture. No brewer, dealer or wholesaler, shall, without permission of the commissioner, adopt or use any container for beer, differing in size from the following:

"11 oz. of beer	whole barrels
12 oz. of beer	half-barrels
22 oz. of beer	quarter-barrels
24 oz. of beer	eight-barrels
32 oz. of beer	
64 oz. of beer."	

RESPONSIBILITY FOR WHOLESALERS CONDUCT

Washington

"7306-27-D. Every licensed brewer, domestic winery and licensed beer importer shall be responsible for the conduct of any licensed beer wholesaler in selling, or contracting to sell, to retail licensees, beer or wine manufactured by such brewer, domestic winery or imported by such beer importer. Where the board finds that any licensed beer or wine wholesaler has violated any of the provisions of this Act or of the regulations of the board in selling or contracting to sell beer or wine to retail licensees, the board may, in addition to any punishment inflicted or imposed upon such whole-

saler, prohibit the sale of the brand or brands of beer or wine involved in such violation to any or all retail licensees within the trade territory usually served by such wholesaler for such period of time as the board may fix, irrespective of whether the brewer manufacturing such beer or the beer importer importing such beer actually participated in such violation."

California

"Sec. 38e. * * * *

"Any director, officer, agent or employee of any licensee who knowingly assists or aids in the violation of this section or any effective posted price or any rule or regulation of the board passed to carry out the provisions of this section shall be guilty of such violation equally with the licensee."

"DISTRESSED" BEER PROVISIONS

Washington

"(50) *Bad Order Claims*. Bad order claims shall be made, adjusted and record thereof preserved as follows:

"(1) No bad order claim shall be allowed except by a brewer or beer importer;

"(2) No bad order claim shall be accepted unless the same shall be made by the retailer within ten days after the defect in the beer or container has been discovered;

"(3) No bad order claim shall be accepted unless the same is made by the retailer in quadruplicate upon forms furnished by the board;

"(4) After the claim has been made out in quadruplicate, one copy (blue) shall be torn from the book and retained by the retailer; one copy (yellow) shall

be torn from the book and retained by the wholesaler in those cases where the wholesaler acts as agent of the brewer in accepting the claim; the original and one copy (pink) shall be torn from the book and forwarded to, or retained by, the brewer or beer importer for action upon the claim;

“(5) At the time of making the final adjustment of the claim, the brewer or beer importer shall mail to the board the pink copy, endorsing thereon the action taken by the brewer or beer importer, together with a certification that in his opinion the claim was valid to the amount allowed;

“(6) All adjustments of bad order claims shall be made by check issued by the brewer or beer importer and payable to the retailer, bearing the bad order claim number or numbers for which adjustment is made;

“(7) All documentary evidence relating to the claim shall be preserved by the retailer and brewer or beer importer for two years after the date of submission of the claim;

“(8) No brewer or beer importer shall allow, nor shall any retailer make claim for, a bad order claim unless the container or the beer is in fact defective.”

Oregon

“REGULATION 10—A (2) Notwithstanding the foregoing provisions, a licensee may be permitted to make sales at other than posted prices for the purpose of closing out a brand of malt beverages, providing the licensee shall first apply in writing to the commission. Such application shall contain the brand name, the quantities of each size of container and the price thereof and shall contain a statement that the licensee will not handle such items for a period of twelve (12) months thereafter. Upon the filing of

such application the Administrator shall prescribe the terms and conditions under which such close-out sales may be made, which shall include the name of the proposed vendee.

* * * * *

“C—*Bad Order Claims*.—No licensee of the commission engaged in the sale of wine or malt beverages for resale within the state shall grant or allow any credit to a licensee of the commission on account of any claimed defect in any wine or malt beverage or container thereof unless such claim for credit shall be approved by the commission. The claim shall be made on forms obtained from the commission and in the following manner:

“1. The claimant (retailer) shall fill out the space provided in the lower left hand corner of the bad order claim, making original and three copies as provided in the bad order claim book, and mail the original copy (white) to the Oregon liquor control commission, 2505 S. E. 11th Ave., Portland, Oregon.

“2. The second (pink) and the third (yellow) copies shall be mailed or delivered immediately to the wholesaler from whom the distressed stock was purchased. The second copy (pink) shall be retained by the wholesaler.

“3. The third copy (yellow) shall be completed by the wholesaler on the space thereon provided after the inspection and approval or disapproval of the distressed stock has been made by him at the retailer's premises. This copy shall then be forwarded to the Oregon liquor control commission, 2505 S. E. 11th Ave., Portland, Oregon.

“4. The fourth or blue copy shall be retained by the claimant (retailer).

“Faulty or distressed beer or wine for which claim

is made shall be held at the retailer's premises until such time as a representative of the commission makes inspection thereof. When the claim is inspected or approved, the retailer will destroy the product in the presence of the inspector. Inspection will not be made until the commission receives the yellow copy from the wholesaler. The claiming or allowance of any fictitious or false claim in this connection shall be regarded by the commission as an act of rendering or receiving financial assistance and shall subject licenses of the offending parties to suspension or revocation at the option of the commission."

California

"Sec. 55.5. (a) No contract relating to the sale or resale of any alcoholic beverage which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such alcoholic beverage and which is in fair and open competition with alcoholic beverages of the same general class produced by others shall be deemed in violation of any law of this State by reason of any of the following provisions which may be contained in such contract:

* * * * *

"(b) Such provisions in any contract shall be deemed to contain or imply conditions that such alcoholic beverage may be resold without reference to such agreement in the following cases:

"(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such alcoholic beverage; providing, however, that at the place of any such sale and upon the goods sold and in any advertisement in connection therewith public notice is given of the character of such sale as a 'close out sale'; provided further, that such alcoholic beverage is first offered to the manufacturer or vendor thereof

at the original invoice price at least ten days before it is offered for sale to the public;"

CERTIFICATES OF APPROVAL OR COMPLIANCE

Washington

"7306-23-F (2) No beer wholesaler nor beer importer shall purchase any beer not manufactured within the State of Washington by a brewer holding a license as a manufacturer of malt liquors from the State of Washington, and/or transport or cause the same to be transported into the State of Washington for resale therein, unless the brewer or manufacturer of such beer has obtained from the Washington State Liquor Control Board a certificate of approval, as hereinafter provided. The certificate of approval herein provided for shall not be granted unless and until such brewer or manufacturer of malt liquors shall have made a written agreement with the board to furnish the board, on or before the tenth day of each month, a report under oath, on a form to be prescribed by the board, showing the quantity of beer sold or delivered to each licensed beer importer during the preceding month, and shall further have agreed with the board, that such brewer or manufacturer of malt liquors and all general sales corporations or agencies maintained by it, and all trade representatives or agents of such brewer or manufacturer of malt liquors, and of such general sales corporations and agencies, shall and will faithfully comply with all laws of the State of Washington pertaining to the sale of intoxicating liquors and all rules and regulations of the Washington State Liquor Control Board. If any brewer or manufacturer of malt liquors shall, after obtaining such certificate, fail to submit such report, or if such brewer or manufacturer of malt liquors or general sales corporation or agency maintained by it,

or any representative or agent thereof, shall violate the terms of such agreement, the board shall, in its discretion, revoke such certificate."

California

"Rule 29. On and after July 1, 1941, no beer wholesaler nor beer importer shall purchase any beer not manufactured within the State of California by a manufacturer holding a license as a beer manufacturer from the State of California, or transport or cause the same to be transported into the State of California for resale therein, unless the manufacturer of such beer has obtained from the board and holds a valid unrevoked and unsuspended certificate of compliance. A certificate of compliance shall be granted when such manufacturer of beer shall have made a written agreement with the board to furnish to the board, on or before the fifteenth day of each month, a report under oath, on a form to be prescribed by the board, showing the quantity of beer sold or delivered by such manufacturer to each licensed beer importer in this State during the preceding month and shall further have agreed with the board, that such manufacturer of beer and all general sales corporations or agencies owned and maintained by it shall and will faithfully comply with all laws of the State of California pertaining to the sale of alcoholic beverages and all rules and regulations of the board. If any such manufacturer of beer shall, after obtaining such certificate, fail to submit such report, or if such manufacturer or general sales corporation or agency owned and maintained by it shall violate the terms of such agreement, the board may suspend or revoke the certificate of compliance in the manner provided by the Alcoholic Beverage Control Act for the suspension or revocation of licenses, and after a hearing which shall be held in the City of Sacramento

or in such other county seat in this State as the board determines to be convenient to the holder of the certificate. No fee shall be charged for such certificate of compliance. But same must be renewed annually on or before July 1st of each year hereafter."

Idaho

"Sec. 6(2). No wholesaler or dealer shall purchase in, or import into, the State of Idaho, any beer, whether manufactured within or without the State of Idaho, by anyone holding a license by the commissioner as a brewer of beer, or as a dealer, and/or transport or cause the same to be transported into or within the State of Idaho, for resale therein, unless the brewer or dealer of such beer has obtained from the commissioner a certificate of approval as hereinafter provided. The certificate of approval herein provided for shall not be granted unless and until such brewer or dealer shall have made a written agreement with said commissioner to furnish to said commissioner on or before the fifteenth day of each month, a report, under oath, on a form to be prescribed by the commissioner, showing the quantity of beer sold by him within the State of Idaho during the preceding month, and shall have further agreed with said commissioner that such brewer or dealer, and all general sales corporations or agencies maintained by such brewer or dealer, and all trade representatives or agencies of such brewer or dealer, shall and will faithfully comply with all of the provisions of the laws of the State of Idaho relating to the regulation and control of the manufacture, sale and distribution of beer, and all rules and regulations adopted pursuant thereto. If any such brewer or dealer shall, after obtaining such certificate, fail to submit such report, or, if any such brewer or dealer, or any general sales corporation or agency maintained by such brewer or dealer, shall violate the terms of such agreement, the commis-

sioner shall give said brewer or dealer not less than fifteen days' notice, by registered mail, of such violation, and to appear before said commissioner and show cause, if any he has, why his certificate of approval should not be revoked, at which time the dealer or brewer may appear before the commissioner and introduce such evidence as he may have concerning said violation, and if said commissioner shall find, upon such hearing, that such brewer or dealer shall have violated any of the provisions of the Act, or any rules or regulations adopted pursuant thereto, he may in his discretion, and in addition to the other penalties herein described, revoke such certificate of approval, or he may suspend the same for a period of time not to exceed six months."

